EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-567

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Petitioner,

vs.

CARL RAY SONGER.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals for the Eleventh Circuit En Banc

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the Court of Appeals err in reaching the merits of Mr. Songer's second habeas corpus appeal when it concluded that it would serve the interests of justice to do so and the district court was sufficiently unsure of its decision to dismiss that it granted a certificate of probable cause to appeal?

Should the Court of Appeals ignore the findings and the record statements of the presiding state court judge, admitting constitutional error, in determining whether the sentencing proceeding over which he presided comported with the Constitution?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Carl Ray Songer, challenged the constitutionality of his death sentence in habeas corpus proceedings. Upon review of his second habeas petition and largely on the basis of findings by the trial court essentially admitting constitutional error, the court of appeals en banc unanimously granted respondent relief from sentence. The State of Florida seeks certiorari review of the appellate court's two-page, per curiam opinion. Respondent urges the Court to deny the State's petition.

CITATION TO OPINIONS BELOW

The August 16, 1985 per curiam judgment of the United States Court of Appeals for the Eleventh Circuit En Banc, granting respondent a retrial on sentencing, is the basis of the State's petition. The court's opnion is reported as Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (en banc) (per curiam).

The order of the district court dismissing the petition but granting a certificate of probable cause to appeal is not reported. Songer v. Wainwright, No. 85-14-Civ-Oc-12 (M.D. Fla. Feb. 2, 1985). It appears at page 63 of the State's "Appendix of Petitioner on Jurisdiction."

JURISDICTION

The opinion of the court of appeals was issued on August 16, 1985. No request for rehearing was filed. The jurisdiction of the Court to grant certiorari to review this case has been invoked under 28 U.S.C. §§ 1254(1), 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

With due respect to the State, the petition involves no constitutional provision.

The petition involves Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, which provides as follows:

> A second or successive petition [for a writ of habeas coprus] may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

Since the State presents a largely "procedural" question, its statement of the case consists primarily of a recitation of the various citations to decisions rendered in this case over the course of its long procedural history. Respondent believes, however, that some description of the substance of those deci-

sions and the situation which they concern would be useful to the Court in assessing whether this case is suitable for review on certiorari of the issues presented by the State.

A. Statement of Facts

Respondent, Carl Ray Songer, was convicted and sentenced to death for the murder of Ronald Smith, a Florida Highway Patrolman. The constitutionality of his penalty trial is the subject of his second habeas corpus petition, and the facts involved are not in dispute.

Florida had enacted a death sentencing statute shortly before respondent was tried in 1974. That statute specifically identified the aggravating and mitigating factors that the sentencer was permitted to consider. See State v. Songer, No. 74-49 CF (Fla. Cir. Ct. Jan. 27, 1985) (appendix reproduces former statute) (A-94).[1] Respondent's was the first capital sentencing trial to occur under the new law in Florida's Ninth and Fifth Judicial Circuits. It was the first experience with such bifurcated proceedings for defense counsel, the prosecutors and the trial judge.

As a result of his study of the statute and discussions with the trial court and the State, defense counsel concluded that his presentation of mitigating evidence was limited to that relevant to those factors enumerated in the statute. Consequently, defense counsel decided not to develop substantial, available mitigating evidence in the form of good-character testimony from

[1] The reference is to the trial court's order on respondent's second state court motion for post-conviction relief, reproduced in the State's appendix at A-94. It was in this order that the trial court in essence found as a factual matter that respondent's sentencing trial had been unconstitutionally narrow, but denied relief on the legal ground that Lockett v. Ohio, 438 U.S. 586 (1978), did not apply retroactively to trials occurring before the date Lockett was decided. See State v. Songer, slip op. at 6 (A108-9).

respondent's parents, former teachers, clergy, employers and friends. Nor did counsel investigate or present an existing Texas parole report which described respondent's temperament as nonviolent, even passive, and his prospects for rehabilitation as excellent. Even the nonstatutory factors which inadvertently found their way into the record -- for example, information that respondent was married with a young son, that he was a brick-mason, that he was hoping to settle his family in Florida -- were unaddressed: defense counsel waived closing argument, as did the prosecutor. The entire penalty phase -- the sum total of time during which the jury was called upon to focus its attention on the respondent as an individual in advance of deciding whether he should live or die -- lasted about a half hour. The reading of the court's instructions took about 2 minutes.

The court's instructions were less than thirteen lines long.[2] The court instructed the jury that a decision to vote for life must be "based upon ... whether sufficient mitigating

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[2] The trial court's sentencing instructions, in their entirety, were as follows:

> Under these procedures, it is now your duty to determine, by majority vote, whether or not you advise the imposition of the death penalty based upon:
>
> One, whether sufficient aggravating circumstances as hereinafter enumerated, exist.
>
> Two, whether sufficient mitigating circumstances exist, as hereinafter enumerated, which outweigh the aggravating circumstances found to exist, and
>
> Three, based on these considerations, whether the defendant should be sentenced to life or death.

These instructions did not use the precise language of the statute. The statute was changed after Lockett expressly to allow all mitigating circumstances into evidence. Now, of course, Florida practice is to use standard jury instructions, which are some five or six pages long. Those instructions make explicit the demands of Lockett and Eddings v. Oklahoma, 455 U.S. 104 (1982).

circumstances exist, as hereinafter enumerated." The court then told the jury that "mitigating circumstances by statute are" those listed in the statute, whereupon the trial court recited the statutory list. Even the verdict form on which the jury was required to indicate its decision emphasized the limitations on the jury's consideration of sentence: the form stated that the jury had considered only "mitigating circumstances as defined in the Court's charge." At no point did the court advise the jury that it could give weight and meaning to its impressions of the character and background of the respondent, and that ultimately its decision was whether a death sentence, considering the totality of the circumstances, was appropriate.

At respondent's second state post-conviction hearing, the trial court itself acknowledged that the sentencing instructions were limiting: "Well, I think the instructions as given did prohibit it [the jury] to just those mitigating circumstances that were in the statute and read." The court also explained why it deemed that limitation appropriate in 1974:

> [W]hen the law war first passed it was strictly limited to the statutory circumstances which were spelled out, and did not include certain items which have since been included by the statute. At that time ... it was restricted to just certain enumerated items.

Thus, the record before the court below demonstrated for the first time that the trial court's admitted intent at respondent's sentencing trial was to preclude the jury from considering any other aspects of the man before them than those few specifically noted in the statute. Moreover, the trial court, which is the ultimate sentencer in Florida, limited its own consideration of sentence to a mechanical weighing of statutory factors; that is what the court believed the statute required.

In January of this year, evidence was discovered which proved the prejudice ordinarily presumed from a Lockett/Eddings violation. A juror who served at respondent's sentencing trial came forward to say that the jury struggled over its sentencing decision and ultimately voted to recommend death only because it felt constrained to do so by the court's charge, and because it placed its collective oath above its collective instinct. Moreover, the juror testified at the second state post-conviction hearing that, had the court instructed that the jury could go beyond the factors listed in the statute, the nonstatutory mitigating evidence now known would have produced a recommendation for life.

B. Course of Proceedings Since Trial

Respondent's original sentence was affirmed by the Supreme Court of Florida on September 22, 1975. Songer v. State, 322 So.2d 481 (Fla. 1975) ("relating the statutorily enumerated mitigating circumstances to the instant case") (emphasis added). No petition for rehearing was filed. This Court granted a petition for certiorari, vacated the sentence, and remanded for resentencing in accordance with Gardner v. Florida, 430 U.S. 349 (1977). Songer v. Florida, 430 U.S. 952 (1977).

At the resentencing hearing, defense counsel moved to impanel a new jury. He also requested a new Pre-Sentencing Investigation report to include information about respondent's background and character, since the prior PSI had been limited to that about his prior criminal record. Respondent himself moved pro se to present character evidence. The trial court denied the motions, and immediately handed counsel an order, prepared in advance of the hearing, reimposing the death sentence on grounds identical to those originally relied upon.

On September 7, 1978, the death sentence was again affirmed in the Florida high court. Songer v. State, 365 So.2d 696 (Fla. 1978). Rehearing was denied with an opinion on December 21, 1978. It was in that opinion that the Florida Supreme Court first addressed the implications of Lockett v. Ohio, 438 U.S. 586 (1978), which had been decided while respondent's appeal was sub judice. However, the court overlooked the significance of Lockett to respondent's case, holding that the statute was on its face constitutionally sound, but saying nothing about what standard was actually applied when respondent was tried. Songer v. State, 365 So.2d 700 (Fla. 1978).

On September 24, 1980, respondent filed a Motion to Vacate Judgment and Sentence, pursuant to Fla. R. Crim. P. 3.850, raising several claims as violations of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. On September 30, 1980, after a limited evidentiary hearing, the trial court denied the motion. The Florida Supreme Court affirmed on September 9, 1982. Songer v. State, 419 So.2d 1044 (Fla. 1982). Rehearing was denied on October 29, 1982.

A state petition for writ of habeas corpus alleging ineffectiveness of appellate counsel was filed in the Florida Supreme Court on November 22, 1982 and denied on December 1, 1982. Songer v. State, 423 So.2d 355 (Fla. 1982).

Repondent first came to the federal courts on December 1, 1982, with a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, Ocala Division. After an evidentiary hearing, the district court denied the petition on July 14, 1983. Songer v. Wainwright, 571 F. Supp. 1384 (M.D. Fla. 1983) (Melton, J.). The district court dealt with respondent's Lockett/Eddings claim as part of its effective assistance of counsel analysis, acknowledging that counsel's failure to introduce nonstatutory mitigating evidence

was the product of a reasonable mistake. Id. at 1395. Having established that trial counsel was not at fault, however, the court was silent on the continuing significance of Lockett. The district court did not then address the fact, regardless of the matter of fault, that respondent simply did not have a sentencing hearing of the scope contemplated by the Eighth Amendment. On appeal from the denial of habeas relief, the court of appeals affirmed on May 18, 1984. Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984). The panel did not address the Lockett/Eddings issue. Rehearing and rehearing en banc were denied on June 26, 1984.

Respondent then sought review in this Court by petition for writ of certiorari. The Court denied the petition on January 7, 1985, with a dissenting opinion by Justices Brennan and Marshall. Songer v. Wainwright, ____ U.S. ____, 83 L.Ed.2d 809 (1985). That dissent represents the first time in the long history of this litigation that any judge had squarely addressed the implications under Lockett and Eddings of respondent's sentencing trial in view of the fact that all of the participants operated under the assumption that evidence of respondent's character and background could not and would not be admitted in mitigation of a death sentence.[3]

[3] Only a few days after this Court denied respondent's petition for certiorari, the court of appeals ordered rehearing en banc in Hitchcock v. Wainwright, 745 F.2d 1348 (11th Cir. 1985), vacating 745 F.2d 1332 (11th Cir. 1984). On the understanding that the court of appeals would deal in Hitchcock with the applicability of Lockett and Eddings to a set of similar circumstances, respondent filed a motion in the court of appeals to recall its mandate pending Hitchcock. The motion was denied on January 29, 1985. Songer v. Wainwright, 755 F.2d 1394 (11th Cir. 1985). Panel rehearing was denied on February 1, 1985, with an amendment to the prior order. Songer v. Wainwright, 755 F.2d 1395 (11th Cir. 1985). The en banc court of appeals vacated that decision four days later. Songer v. Wainwright, 756 F.2d 799 (11th Cir. 1985) (en banc). See note 6, infra.

On January 24, 1985, respondent filed a second motion to vacate sentence in the trial court. After a hearing on January 25, the trial court entered an order on January 27, implicitly finding that nonstatutory mitigating evidence had been precluded from respondent's sentencing hearing because of a narrow understanding and application of Florida's sentencing statute by every participant at the trial. State v. Songer, No. 74-49 CF, slip. op. at 5-6 (A-105-09). But the court denied relief on the sole legal ground that Lockett does not apply retroactively. Id. (A-108-09). The Florida Supreme Court affirmed the denial of relief on January 31, 1985. Songer v. State, 463 So.2d 229 (Fla. 1985). A petition for certiorari on the question whether Lockett v. Ohio is retroactive was filed on the same day, and denied by this Court on June 10, 1985. Songer v. Florida, ____ U.S. ____, 86 L.Ed.2d 728 (1985).

Also on January 31, 1985, respondent brought his claims to the federal district court in a second petition for a writ of habeas corpus. The court heard oral argument on February 1, at which petitioner and respondent argued their positions with respect to the court's discretion to redetermine the merits of the successive petition. See Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts. The parties stipulated to the admission in evidence of the transcript of the January 25, 1985 trial court hearing.[4]

In an order entered on February 2, 1985, the district court dismissed the petition on the ground that "the ends of justice would not be served by a redetermination of the issues raised," Songer v. Wainwright, No. 85-14-Civ-Oc-12, slip op. at 13 (M.D.

[4] Respondent would note that the facts adduced at that hearing are uncontroverted. The State waived cross-examination of every witness and offered no evidence in rebuttal whatsoever.

Fla. Feb. 2, 1985) (Melton, J.) (A-83). The district court concluded that respondent's case was not similar enough to one of three examples from Supreme Court and Eleventh Circuit cases where redetermination of constitutional issues had been deemed to serve the ends of justice. Slip op. at 7-13 (A-74-83). However, the district court issued a certificate of probable cause to appeal (A-84-85); thus, the court of appeals was bound to reach the merits of respondent's claims. Barefoot v. Estelle, ____ U.S. ____, 77 L.Ed.2d 1090, 1104 (1983). On February 5, the day after oral argument, the panel expressed its view that the merits of respondent's claims "should be heard by the court en banc along with Hitchcock v. Wainwright," the case the court had earlier ordered reheard en banc and that respondent had all along maintained was closely related. Songer v. Wainwright, 756 F.2d 800 (11th Cir. 1985). The court explained that:

> In general we are not able to predict the exact contours of any en banc decision that may be rendered in Hitchcock on the Lockett issue in the case, and the extent, if any, to which this issue might affect this case. Nor can we, as a panel of the court, properly attempt to decide or limit what the court may decide in Hitchcock. Without knowing the parameters of Hitchcock, we cannot say with assurance what, if any, issues in this case may fall outside of Hitchcock.

Id. at 801.[5] On March 20, 1985, the court of appeals voted to hear respondent's appeal en banc.[6] Songer v. Wainwright, 756 F.2d 1482 (11th Cir. 1985) (en banc).

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[5] The court granted a stay until the full court could vote whether to hear this case with Hitchcock. This Court denied the State's application to vacate the lower court's stay. Wainwright v. Songer, ____ U.S. ____, 84 L.Ed.2d 308 (1985). The State sought the Court's reconsideration of that action by means of a petition for certiorari before judgment. The Court denied that petition on June 10, 1985. Wainwright v. Songer, ____ U.S. ____, 86 L.Ed.2d 727 (1985).

[6] On April 9, 1985, the en banc court vacated its opinion and judgment on the original appeal and consolidated that appeal for rehearing en banc with the second appeal. Songer v. Wainwright, 758 F.2d 533 (11th Cir. 1985) (en banc), vacating 733 F.2d 788

The decision of the en banc court of appeals was rendered on August 16, 1985; in a brief, per curiam opinion the court unanimously vacated the judgment of the district court. In the court of appeals' view, the "statements ... [of the trial judge during the January 1985 hearing in state court] indicating that he interpreted Florida Statute § 921.141[7] at the time of [respondent's] trial as limiting consideration of mitigating evidence to those 'enumerated items'" and that "he thus did not give consideration to any evidence dealing with nonstatutory mitigation," id. (emphasis in original), demonstrated "new and different grounds for relief ... that [respondent] could not have presented" in his first habeas corpus proceeding. The court concluded that "it is clear that the state sentencing judge refused to give any consideration to nonstatutory mitigating evidence at ether the first or second sentencing proceedings. The interests of justice require that this be corrected." Id. (emphasis added).[7]

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD DENY CERTIORARI BECAUSE THE COURT OF APPEALS APPLIED THE CORRECT STANDARD FOR CONSIDERING SUCCESSIVE HABEAS CORPUS APPEALS UNDER SANDERS V. UNITED STATES AND RULE 9(b)

Petitioner and respondent do not differ on the legal standard to be applied in cases like this in which a state

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(11th Cir. 1984). On August 16, the en banc court reinstated the panel opinion. Songer v. Wainwright, 769 F.2d 1497 (11th Cir. 1985) (en banc) (per curiam).

[7] The court of appeals left to the trial judge's discretion the decision on whether to impanel a jury for the resentencing hearing. Songer v. Wainwright, 769 F.2d 1488, 1489-90 n.1 (11th Cir. 1985) (en banc). Four members of the court believed that the respondent was constitutionally entitled to a new jury on resentencing. Id. at 1490-96. This view is partly the basis of the respondent's cross-petition for certiorari, also filed today.

prisoner petitions the federal courts for redetermination of issues that have once been determined adversely. As the Court stated unequivocally in Sanders v. United States, 373 U.S. 1 (1963),

> Controlling weight may be given to denial of a prior application for federal habeas corpus ... only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

373 U.S. at 15 (emphasis added). See Petition for Certiorari at 15-16.

Congress itself has recognized that state prisoners have a right to bring to the federal courts, in certain circumstances, issues arising under the federal Constitution which challenge the integrity of a state court judgment. 28 U.S.C. §§ 2244(a), 2254. Section 2244(a), Rule 9(b) of the Rules Governing Section 2254 Cases In The United States District Courts, and the Advisory Committee Notes explaining the rule plainly contemplate that state prisoners will sometimes be able to relitigate their cases in the federal courts, even where the same issues are presented again. On the wisdom of Sanders v. United States, Rule 9 permits a federal court to revisit issues previously resolved on the merits if doing so would serve the ends of justice.[8]

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[8] Moreover, in this case the State overlooks the significance of the district court's decision to grant a certificate of probable cause. 28 U.S.C. § 2253. As this Court has stated:

> When a certificate of probable cause is issued by the district court, ... petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal. Accordingly, a circuit court, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of the appeal....

New, specific and presumptively correct state court fact findings show that respondent presented that "rare instance," Rule 9(b) advisory committee note, where reconsideration of a claim served the ends of justice. The State does not dispute the fact that respondent's sentencing hearing was not of the scope required by Lockett and Eddings. Nor does the State dispute that the limited scope was produced by an unconstitutionally narrow understanding and application of the Florida sentencing statute by the trial judge.[9] Faced with these uncontroverted, presumptively correct facts, the court of appeals held that "it is clear that the state sentencing judge refused to give any consideration to nonstatutory mitigating evdence at either the first or second sentencing proceedings. The interests of justice require that this be corrected." Songer v. Wainwright, 769 F.2d at 1489. This is precisely the approach authorized by law.

The essence of the State's petition is that the court of appeals erred, not by using an incorrect standard, but in applying the well-established one. Citing Pullman-Standard v. Swint, 456 U.S. 273 (1982), the State maintains that a conclusion on whether the ends of justice are served is a finding of fact. Petition for Certiorari at 16-17. Thus, in the State's view, once the district court "concluded that the ends of justice would not be served by a redetermination of the issues raised" (A-83), all that remained for the court of appeals was to affirm the district court's denial of relief -- unless the conclusion on

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Barefoot v. Estelle, ____ U.S. ____, 77 L.Ed.2d 1090, 1104 (1983) (emphasis supplied). The court below fully understood the demands placed upon it by the certificate of probable cause to reach and resolve the merits of respondent's appeal. It also appreciated the problems in doing so while similar issues are pending and unresolved before the court en banc. As the court explained, the pendency of Hitchcock en banc simply made prior, summary disposition of the merits of respondent's case imprudent. See Songer v. Wainwright, 756 F.2d 800, 801 (11th Cir. 1985).

[9] Indeed: in January of this year, the trial judge so found. See 28 U.S.C. § 2254(d).

"the ends of justice" is clearly erroneous. However, it ignores both law and common sense to deem "the ends of justice" a "pure question of fact," see Pullman-Standard v. Swint, 456 U.S. at 288. Congress and this Court set standards of law, and the "ends of justice" is precisely such a legal standard. The court below applied this standard to a set of uncontroverted facts and correctly determined that respondent was entitled to relief.

The State makes special note of the court of appeals's statement that "the record does establish new and different grounds for relief ... that [respondent] could not have presented" previously, Songer v. Wainwright, 769 F.2d at 1489. See Petition for Certiorari at 17. The State then argues that at most the instant proceedings involve additional facts, and therefore that the en banc court's decision conflicts with two of the Circuit's panels which have held that relief should not be granted on second petitions that merely allege additional facts. See Shriner v. Wainwright, 735 F.2d 1236 (11th Cir. 1984); Smith v. Kemp, 715 F.2d 1459 (11th Cir. 1983). Again, the State overstates the disposition of this case below.

First, the "new and different grounds" language notwithstanding, it is clear that the court reached its judgment correctly under Rule 9(b) by concluding that "[t]he interests of justice require that [respondent's unconstitutional sentencing trial] be corrected." Songer, 769 F.2d at 1489. Second, the fact that panels of the Eleventh Circuit declined to revisit the merits of issues in Shriner and Smith, while the entire Circuit felt compelled to do so here, proves nothing more than that the significance of new facts depends on the circumstances of a particular case; in each case, the court acknowledged that it had discretion to revisit the merits of cases where the ends of justice warrant. Songer v. Wainwright, 769 F.2d at 1489; Shriner v. Wainwright, 735 F.2d at 1239-40; Smith v. Kemp, 715 F.2d at

1468. Whether new facts warrant reconsideration of the merits is a question of judgment, guided by allegiance to the ends of justice, necessarily dependent on the contours of each case. Here, the court was faced with patent, undisputed constitutional error and findings of the state court owning up to it. In essence, the court unanimously concluded that the ends of justice are served by denying the State the opportunity to take respondent's life when every relevant actor effectively agreed that the sentencing hearing violated Lockett and Eddings.

The State's petition should be denied.

II.

THE COURT SHOULD DENY CERTIORARI BECAUSE THE STATE HAS WAIVED ANY OBJECTION TO THE COURT'S CONSIDERATION OF THE TRIAL COURT'S RECORD ADMISSIONS OF CONSTITUTIONAL ERROR BY FAILING TO RAISE THE QUESTION AT ANY TIME BEFORE THE INSTANT PETITION AND, MOREOVER, BECAUSE THE STATEMENTS COMPLAINED OF ARE REFLECTED IN THE TRIAL COURT'S PRESUMPTIVELY CORRECT FINDINGS

In accordance with Florida practice, the judge who presided at respondent's trial also presided at his state post-conviction hearing. On the record at that hearing in January, the trial court made statements conclusively demonstrating that, in violation of Eddings, he had failed to consider any factor in mitigation of a death sentence that was not contained in the statutory list. (Some of the court's statements are reproduced in the State's appendix at A-254). Thereafter, the judge made findings indicating he had limited consideration of mitigating circumstances at the time of respondent's trial in violation of Lockett; yet the court denied relief on the ground that Lockett has not been held retroactive. (A-106-09). For the first time in

the history of this case, the State challenges the propriety of considering these facts. Two reasons demand prompt denial of certiorari on this point.

First, the State's objection is new. In the district court, before the appellate panel, before the en banc court of appeals, and even in its petition to this Court, the State argued that, even considering the judge's statements and findings, respondent's habeas appeal was meritless simply because successive. Only now does the State suggest that the trial court's record admissions cannot be considered. The argument was never presented to the court below; there is therefore nothing for the Court's review.

Second, the State's objection is unfounded. Fayerweather v. Ritch, 195 U.S. 276 (1904), and its progeny disfavor calling judges to testify. Underlying the decision is concern for the risk of judges being summoned by litigants to explain their mental processes in further depth than they have in an order or opinion. Here, the trial court was never summoned, never called as a witness, never asked a question. Indeed, the proceedings at which he made his statements were before him only because Florida practice required it. The trial judge volunteered his observations from the bench. More importantly, he made findings of fact, presumptively correct under 28 U.S.C. § 2254(d), on the basis of those observations. To adopt the State's position, and ignore the trial court's candor, would be to extend Fayerweather into the nether world.

CONCLUSION

For the foregoing reasons, the State's petition for a writ of certiorari should be denied.

Respectfully submitted,

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